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No. 03-761

# In the Supreme Court of the United States

RANCHO VIEJO, LLC, PETITIONER

*v.*

GALE A. NORTON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether restrictions on commercial development activities that would result in the taking of endangered arroyo toads, imposed pursuant to Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), and implementing regulations, are a permissible exercise of Congress's authority under the Commerce Clause.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 323 F.3d 1062. The opinion of the district court (Pet. Supp. App. 1a-19a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 1, 2003. A petition for rehearing was denied on July 22, 2003 (Pet. App. 32a-37a). On October 15, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 19, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior, and the National Marine Fisheries Service (NMFS) in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the Secretary of the Interior or of Commerce to list domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by any person who does not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). Federal regulations further define the term "harm" to encompass conduct that "actually kills or injures wildlife," which may include "significant habitat modification or degradation" that "impair[s] essential behavioral patterns." 50 C.F.R. 17.3; see *Babbitt* v. *Sweet Home Chapter of Cmtys*, 515 U.S. 687 (1995) (upholding regulatory definition of "harm" for purposes of Section 9 "take" prohibition).

Pursuant to Section 10 of the ESA, the Secretary of the Interior or of Commerce may issue a permit for the

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

"incidental take" of listed species under certain circumstances. 16 U.S.C. 1539(a)(3)(B)(i)-(v). Any taking of a listed species consistent with such an "incidental take" permit does not violate Section 9. 16 U.S.C. 1539(a)(1)(B).

Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires each federal agency to ensure, in consultation with the FWS or NMFS, that any action it authorizes, funds, or carries out is not likely to "jeopardize the continued existence of any endangered species." When a federal agency engages in "formal" consultation with the relevant consulting agency (FWS or NMFS), the consulting agency produces a biological opinion that assesses whether the proposed action is likely to jeopardize the listed species. 16 U.S.C. 1536(b)(4). If the FWS or NMFS concludes that jeopardy is likely, the biological opinion may identify reasonable and prudent alternatives to the action. 16 U.S.C. 1536(b)(3)(A). If the consulting agency determines that the proposed action is not likely to jeopardize the listed species, or offers reasonable and prudent alternatives that the consulting agency believes would not result in jeopardy, the biological opinion may include an incidental take statement that identifies terms and conditions to minimize the taking of listed species. 16 U.S.C. 1536(b)(4). Any taking that is in compliance with the terms and conditions in the incidental take statement is not prohibited by Section 9. 16 U.S.C. 1536(*o*)(2).

2. On December 16, 1994, the arroyo toad (*Bufo californicus*) was listed as an endangered species. 59 Fed. Reg. 64,859; Pet. App. 39a. The arroyo toad is approximately two to three inches in length. Arroyo toads breed on shallow pools and open sand and gravel channels along medium to large streams, but they spend most of their adult lives in upland habitats,

burrowing underground during inactive periods. 66 Fed Reg. 9414, 9415 (2001). Adult toads may range as far as 1.2 miles from the streams where they breed. *Ibid.*; see Pet. App. 40a.

The arroyo toad is found in coastal and desert drainages from Monterey County, California, to northwestern Mexico. 66 Fed. Reg. at 9414; Pet. App. 40a. Many arroyo toad populations have been extirpated or reduced in size, due principally to habitat loss, including from activities such as mining, grazing, recreation, urbanization, road construction, and dam construction. 66 Fed. Reg. at 9414; 59 Fed. Reg. at 64,862.

3. Petitioner is a real estate development company located in California. Petitioner proposed to build a 280-home development on a 202-acre site located in northern San Diego County. The property is bordered on the south by Keys Creek, a tributary of the San Luis Rey River. The precise terms of petitioner's development plans have varied over the years, but at the time this case was brought, petitioner proposed to build homes within an upland area of approximately 52 acres. An additional 77 acres of upland, as well as portions of Keys Creek, were to be used as a borrow area to extract fill for the construction site. The excavation of those 77 acres was expected to involve removal of approximately 750,000 cubic yards of fill material. Pet. App. 4a, 38a-39a.

On May 21, 1999, petitioner filed an application with the United States Army Corps of Engineers (Corps) to obtain a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, for the discharge of dredged or fill material into waters of the United States. The Corps determined that the project "may affect" the arroyo toad, and it requested formal consultation with the FWS. Pet. App. 39a; see p. 3, *supra*.

In May 2000, petitioner began ground-disturbing activities in the 77-acre borrow area. *Inter alia*, petitioner excavated a trench and erected a fence along the trench paralleling the bank of Keys Creek, approximately 50-100 feet uphill from the riparian vegetation along the creek. The FWS and petitioner's own consultant subsequently confirmed the presence of arroyo toads on the upland side of the exclusionary fence. Previous surveys carried out by petitioner's consultants had confirmed the presence of arroyo toads in Keys Creek during the breeding season, and the FWS determined that the fence could impede the toads' movement between the upland area and their breeding habitat. On May 22, 2000, the FWS informed petitioner that the construction and continued existence of the exclusionary fence violated ESA Section 9's take prohibition. Petitioner nevertheless refused to remove the fence. Pet. App. 5a, 40a-41a.

In August 2000, the FWS issued a biological opinion, which determined that the excavation of the 77-acre upland borrow area was likely to jeopardize the continued existence of the arroyo toad. Pursuant to Section 7(b)(3)(A) of the ESA, 16 U.S.C. 1536(b)(3)(A), the FWS developed a reasonable and prudent alternative that would allow petitioner to implement its proposed plan to build 280 homes on the 52-acre parcel by obtaining fill dirt from off-site sources. The biological opinion included an incidental take statement that allows petitioner to "take" arroyo toads incidental to its housing development project if it complies with the terms and conditions set forth in the reasonable and prudent alternative described in the opinion. Pet. App. 5a, 42a.

3. On November 20, 2000, petitioner filed suit in federal district court, alleging that the application of

ESA Section 9 to petitioner's construction activities exceeded Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Pet. Supp. App. 2a. On August 20, 2001, the district court granted the government's motion for summary judgment. *Id.* at 1a-19a.

The district court found this case to be controlled by the court of appeals' decision in *National Ass'n of Homebuilders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*), cert. denied, 524 U.S. 937 (1998), which upheld the application of ESA Section 9 to a hospital construction project in California. Pet. Supp. App. 10a-11a; see Pet. App. 6a. The district court also independently applied the four-factor analytical framework, established by this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), for determining whether a particular regulatory scheme is a permissible exercise of congressional authority under the Commerce Clause. The district court concluded that the ESA's prohibition on takings of endangered species is constitutional under that framework. Pet. Supp. App. 11a-17a. The court rejected petitioner's contention that *NAHB* has been undermined by this Court's subsequent decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and it held that the take provision does not impermissibly extend federal authority to the area of land use. Pet. Supp. App. 17a-19a.

5. The court of appeals affirmed. Pet. App. 1a-31a.

a. The court of appeals explained that in this case, as in *NAHB*, the primary conduct that is regulated by ESA Section 9 (here, "the construction of a 202-acre commercial housing development") is "plainly an economic enterprise." Pet. App. 9a. The court acknowledged that "Section 9 of the ESA has no express juris-

dictional hook that limits its application, for example, to takes 'in or affecting commerce.'" *Id.* at 10a. The court observed, however, that "*Lopez* did not indicate that such a hook is required, * * * and its absence did not dissuade the * * * *NAHB* court from finding application of the ESA constitutional." *Ibid.* Rather, the court explained, the absence of an express jurisdictional element simply required the court to determine independently whether the regulated activity bore a constitutionally sufficient nexus to interstate commerce. *Ibid.* The court of appeals concluded that application of ESA Section 9 to petitioner's conduct is a permissible exercise of Commerce Clause authority because petitioner's commercial housing development —like the hospital construction project involved in *NAHB*—"is presumably being constructed using materials and people from outside the state and * * * will attract construction workers and purchasers from both inside and outside [California]." *Id.* at 12a (internal quotation marks omitted).

b. The court of appeals rejected petitioner's contention that the *NAHB* court's analysis had been superseded by this Court's decisions in *Morrison* and *SWANCC*. Pet. App. 13a-18a. The court noted that *SWANCC* involved the interpretation of the Clean Water Act, and that the Court in that case had declined to resolve the plaintiff's constitutional challenge. See *id.* at 14a. The court found *Morrison* to be distinguishable because that case "involved the regulation of purely noneconomic activity." *Id.* at 17a. The court observed that "[h]ere, by contrast, both the actor, a real estate company, and its conduct, the construction of a housing development, have a plainly commercial character." *Ibid.* (internal quotation marks omitted).

c. The court of appeals rejected petitioner's contention that, even if its own conduct is economic in character, application of ESA Section 9 to its construction activities is impermissible because Section 9 has a noneconomic *purpose*, namely the protection of biodiversity. Pet. App. 18a-24a. The court observed that "the ESA, like many statutes, has multiple purposes," *id.* at 18a, and that any effort to identify Section 9's "true" or "primary" purpose would be "fraught with both difficulty and danger," *id.* at 19a. The court of appeals also noted that this Court "has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity." *Id.* at 20a.

d. The court of appeals held that petitioner could not avoid the application of ESA Section 9 to its own commercial activities based on the possibility of hypothetical applications of the statute to noneconomic conduct. Pet. App. 24a-27a. The court of appeals explained that, because "the particular application [of Section 9] before us involves the regulation of [petitioner's] commercial real estate development, which falls well within the powers granted Congress under the Commerce Clause," the court "need not decide" whether Section 9 would be constitutional as applied to a taking caused by a hiker's recreational activities. *Id.* at 25a. The court further observed that "the constitutional circumstances we rely on here—takings by commercial developers—are neither an unintended nor an insignificant portion of the activities regulated by the ESA." *Id.* at 26a. Rather, in enacting the ESA, "Congress expressly found that economic growth and development untempered by adequate concern and conservation was the cause for various species of fish, wildlife, and plants in

the United States having been rendered extinct." *Ibid.* (brackets and internal quotation marks omitted).

e. The court of appeals rejected petitioner's contention that "the ESA represents an unlawful assertion of congressional power over local land use decisions." Pet. App. 27a. The court explained that, "[f]ar from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of 'truly national' concern." *Ibid.* The court observed that "the preservation of endangered species is historically a federal function," and that "invalidating this application of the ESA would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans." *Id.* at 29a (internal quotation marks omitted).

f. Judge Ginsburg filed a separate concurring opinion. Pet. App. 30a-31a. Judge Ginsburg expressed the view that, "with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if —the take itself substantially affects interstate commerce." *Id.* at 30a. He concluded that the application of ESA Section 9 to petitioner's conduct is permissible because "[t]he large-scale residential development that is the take in this case clearly does affect interstate commerce." *Id.* at 30a-31a. Judge Ginsburg stated, however, that "the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce." *Id.* at 31a.

g. The court of appeals denied petitioner's petition for rehearing and rehearing en banc, with Judge

Sentelle and Judge Roberts dissenting. Pet. App. 32a-37a.[2]

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 6-14) that the court of appeals' decision conflicts with this Court's decisions in *Lopez*, *Morrison*, and *Jones* v. *United States*, 529 U.S. 848 (2000). That claim is incorrect.

a. The thrust of the court of appeals' analysis is that, whether or not Congress may constitutionally ban those takings of endangered species that result from noncommercial activity, ESA Section 9 is constitutional as applied to petitioner's own conduct. The court explained that in this case, "both the 'actor,' a real estate company, and its 'conduct,' the construction of a housing development, have a plainly commercial character." Pet. App. 17a. Petitioner argues (*e.g.*, Pet. 8-9) that, under *Lopez* and *Morrison*, the court of appeals was required to focus on the generic class of activity prohibited by the provision in question (takings of arroyo toads) and to ignore the economic character of petitioner's own activities.

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[2] By letter dated December 30, 2003, petitioner informed the Court that the Corps has issued petitioner a provisional permit under Section 404 of the Clean Water Act. We agree with petitioner that the Corps' issuance of that permit does not render this case moot. As petitioner's December 30 letter explains, the Section 404 permit is expressly made contingent on petitioner's compliance with the terms and conditions identified in the incidental take statement of the FWS's biological opinion. See Pet. Notice of Intervening Matter at 2, Exh. A at 6.

Contrary to petitioner's contention, *Lopez* and *Morrison* simply do not address the question whether Commerce Clause legislation may be sustained "as applied" to commercial activities even where the statute in question also covers noneconomic conduct. Rather, this Court decided both *Lopez* and *Morrison* on the understanding that, in those cases, "neither the actors nor their conduct ha[d] a commercial character." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). In the present case, by contrast, the "regulated activity is [petitioner's] planned commercial development, not the arroyo toad that it threatens." Pet. App. 16a. Because petitioner is a business entity, and the regulated conduct at issue here is economic in character, this case is very different from *Lopez* and *Morrison*.[3]

b. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973).

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[3] As petitioner observes (Pet. 9), the court of appeals in *Lopez* stated that the defendant had brought his gun to school for the purpose of selling it. See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). But since this Court did not allude to that fact or discuss its significance, its decision cannot properly be understood to hold that "as applied" analysis is inapplicable to Commerce Clause legislation. In any event, there is no reason to suppose that violations of the Gun-Free School Zones Act (the law at issue in *Lopez*) *frequently* involved economically motivated conduct. By contrast, takings of endangered species in violation of ESA Section 9 characteristically result from economic activity. See pp. 12-13, *infra*.

Petitioner identifies no decision of this Court that has held, and no sound reason to conclude, that this principle is inapplicable to judicial review of Commerce Clause legislation. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute).[4]

As the court of appeals observed, moreover, "takings by commercial developers * * * are neither an unintended nor an insignificant portion of the activities regulated by the ESA." Pet. App. 26a. The ESA contains an express congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from

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[4] As the court of appeals recognized (Pet. App. 25a), petitioner's legal theory reflects an artful attempt to obtain the most advantageous features of both "as applied" and "facial" review. On the one hand, petitioner "would like [the Court] to consider its challenge to the ESA only as applied to the arroyo toad, which it says has no known commercial value." *Ibid.* (internal quotation marks omitted); see Pet. 4 (noting that the FWS has not made "express findings of any connection between the arroyo toad and interstate commerce"); Pet. 13 ("[T]he listing of the arroyo toad aims at conduct that by its terms has nothing to do with interstate commerce."). At the same time, petitioner asks the Court to disregard its own status as a business entity and the commercial character of the specific development activities that are alleged to violate the take prohibition in this case.

economic activity." *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 639 (5th Cir. 2003); see Pet. App. 27a (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities").

In that respect, this case is quite different from *Lopez* and *Morrison*, in which there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors. See note 3, *supra*; cf. *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover"). Indeed, petitioner identifies *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly noneconomic purposes. The theoretical possibility that the take prohibition might someday be applied "to a hiker's casual walk in the woods," Pet. App. 24a (internal quotation marks omitted), provides no basis for declaring its application to be unconstitutional here.

c. Petitioner contends (Pet. 8-9) that the court of appeals' decision conflicts with *Morrison* by suggesting that Commerce Clause legislation may be sustained based on the effects on interstate commerce of regulated noneconomic activity. That claim is baseless. The court of appeals correctly observed that the Court in *Morrison* had declined to adopt a categorical rule prohibiting regulation under the Commerce Clause of noneconomic activity; indeed, petitioner conceded as much

in its appellate brief. See Pet. App. 15a-16a; *Morrison*, 529 U.S. at 613 ("[W]e need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases."). That aspect of the court of appeals' analysis was irrelevant, however, to its ultimate disposition of the case. Because the court of appeals found the economic character of petitioner's own conduct to be a sufficient basis for upholding ESA Section 9's application to this case, it did not purport to resolve the question whether, or under what circumstances, noneconomic conduct may be an appropriate subject of Commerce Clause regulation. See Pet. App. 16a.

There is also no merit to petitioner's contention (Pet. 10) that the absence of an express jurisdictional element renders ESA Section 9 unconstitutional. Although this Court in both *Lopez* (see 514 U.S. at 561-562) and *Morrison* (see 529 U.S. at 611-612) found the absence of an express jurisdictional element to be relevant to the constitutional analysis, neither decision suggests that such an element is a prerequisite to valid Commerce Clause legislation. As the court of appeals correctly observed, "all of the circuits that have addressed the question since *Lopez* (as well as those that have considered the matter since *Morrison*) have concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a.[5]

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[5] See, *e.g.*, *Groome Resources Ltd., L.L.C.* v. *Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (upholding provision of Fair Housing Amendments Act despite lack of express jurisdictional element); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding ESA restrictions on taking of red wolves despite lack of jurisdictional element), cert. denied, 531 U.S. 1145 (2001); *United States* v. *Moghadam*, 175 F.3d 1269, 1276-1277 (11th Cir. 1999) (noting that a

d. Petitioner's reliance (Pet. 11) on *Jones* v. *United States*, 529 U.S. 848 (2000), is similarly misplaced. The criminal conduct at issue in *Jones*—arson of a private residence—was committed by a private person for noneconomic reasons. By contrast, the violation of ESA Section 9 in this case was committed by a commercial development firm in the course of large-scale economic activity. Nothing in *Jones* suggests that Congress lacks power to regulate commercial activities of the sort in which petitioner engaged.

2. Contrary to petitioner's contention (Pet. 14-24), the court of appeals' decision in this case does not conflict with any decision of another circuit.

a. The courts of appeals have uniformly sustained the constitutionality of ESA Section 9's prohibition on takings of listed species. See *GDF Realty*, *supra* (upholding restrictions on takings of cave invertebrates); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding restrictions on takings of red wolves), cert. denied, 531 U.S. 1145 (2001); *NAHB*, *supra* (upholding application of ESA Section 9 to the Delhi Sands Flower Loving Fly).[6] Indeed, to our knowledge no court—either

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jurisdictional element "is helpful" but that its absence "does not necessarily mean the Commerce Clause cannot serve as authority"), cert. denied, 529 U.S. 1036 (2000); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (Comprehensive Environmental Recovery, Compensation, and Liability Act valid as applied despite lack of jurisdictional element).

[6] See also *Shields* v. *Babbitt*, 229 F. Supp. 2d 638 (W.D. Tex. 2000) (upholding restrictions on takings of certain aquatic species), vacated on other grounds, 289 F.3d 832 (5th Cir.), cert. denied, 537 U.S. 1071 (2002); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1997) (upholding the constitutionality of the Bald Eagle Protection Act); *Building Indus. Ass'n of Superior Cal.* v. *Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (upholding application of ESA Section 9 to fairy shrimp regulation), appeal dismissed, 161 F.3d 740 (D.C. Cir.

before or after this Court's decision in *Lopez*—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate since systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures. See Pet. App. 28a-29a; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment").[7]

b. Petitioner does not contend that any other court of appeals has held ESA Section 9 to be beyond the scope of Congress's authority. In asserting that a circuit conflict exists, petitioner principally argues (see Pet. 14-17, 22-24) that the court of appeals' *reasoning* in this case is inconsistent with the Fifth Circuit's analysis in *GDF Realty*. The court in *GDF Realty* found that the economic character of the plaintiff's own activities (commercial development of real property), standing alone, was not a sufficient basis for sustaining the application of ESA Section 9 to that conduct. See 326 F.3d at 626, 634-635. The court went on to hold, however, that takings of *all* endangered species, considered in

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1998); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981).

[7] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

the aggregate, would have a substantial effect on interstate commerce; and on that basis it sustained ESA Section 9 as a permissible exercise of Commerce Clause authority. See *id.* at 638-639.

The fact that the courts of appeals have employed somewhat different rationales in upholding ESA Section 9 against constitutional challenge does not create a circuit conflict. This Court "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). Absent some disagreement among the circuits regarding the ultimate question whether ESA Section 9 is constitutional, this Court's review is not warranted.

Moreover, petitioner overstates even the divergence between the approaches of the Fifth and D.C. Circuits. The D.C. Circuit in *NAHB* had previously endorsed the biodiversity rationale on which the *GDF Realty* court later relied. That same rationale furnishes an independent basis for sustaining the application of the ESA in this case, and the court of appeals in fact specifically disclaimed any intent to repudiate that aspect of *NAHB*'s analysis. See Pet. App. 8a-9a & n.2. Rather, in light of the commercial character of petitioner's own activities, the court of appeals "simply ha[d] no need to consider * * * other rationales to dispose of the case before [it]." *Id.* at 9a. And while the Fifth Circuit in *GDF Realty* declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character, the court found it "obvious that the majority of takes would result from economic activity," and the court appeared to attach some (though not dispositive) significance to

the fact that the specific takes at issue in the case "would occur as a result of plaintiffs' planned commercial development." 326 F.3d at 639.[8]

c. Petitioner contends (Pet. 20-22) that two other subsidiary features of the court of appeals' analysis conflict with decisions of other circuits. Those claims lack merit.

Petitioner argues (Pet. 20-21) that the D.C. Circuit's decision, by leaving open the possibility that Commerce Clause legislation could be sustained based on the aggregate effects of noneconomic conduct, conflicts with decisions of other courts of appeals. In fact, however, the court of appeals simply (and accurately) noted

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[8] Petitioner's reliance (Pet. 19) on *United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003), is misplaced. In *Stewart*, a panel of the Ninth Circuit held that 18 U.S.C. 922(*o*), which generally prohibits possession of machineguns, is unconstitutional as applied to "homemade" machineguns. 348 F.3d at 1134-1142. The panel found that "[p]ossession of a machinegun is not, without more, economic in nature," *id.* at 1137, and it observed that Section 922(*o*) "contains no jurisdictional element," *id.* at 1138. The government's petition for rehearing en banc in *Stewart* is currently pending before the court of appeals. But, in any event, the panel in *Stewart* held Section 922(*o*) unconstitutional *only* as applied to simple possession of *homemade* machineguns. The panel did not suggest that the statute would be invalid as applied to acts of machinegun possession with such connections to interstate commerce as, *e.g.*, possession of a machinegun that had traveled in interstate commerce, or possession of a machinegun with the intent to sell it. Thus, with respect to the question presented in this case—*i.e.*, whether Commerce Clause legislation may be upheld as applied to a particular set of facts, based on the economic character of the specific conduct that is alleged to violate the statute—the decision in *Stewart* provides no support for petitioner's position. Indeed, petitioner's theory logically suggests that, because Section 922(*o*) is not limited to acts of machinegun possession having a specified connection to interstate commerce, that statute is invalid in *all* its applications.

that this Court in *Morrison* had declined to announce a categorical rule against aggregation in this context. See Pet. App. 15a-16a; pp. 13-14, *supra*. The court of appeals found it unnecessary to decide whether such aggregation would ever be appropriate. See Pet. App. 16a. The court's express *reservation* of that question cannot plausibly be thought to conflict with other court of appeals decisions addressing the issue.

There is likewise no merit to petitioner's contention (Pet. 21-22) that a circuit split exists regarding the significance, for Commerce Clause analysis, of an express jurisdictional element. As the D.C. Circuit recognized in this case, every post-*Lopez* appellate decision addressing the question "ha[s] concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a; see p. 14 & n.5, *supra*. Petitioner's reliance (Pet. 22) on *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), is misplaced. The Ninth Circuit in *McCoy* simply held that the presence of a jurisdictional element does not *ensure* that a particular statute is a valid exercise of congressional power under the Commerce Clause. See *id.* at 1124-1126. The court in *McCoy* did not address the question whether a jurisdictional element *must* be included to sustain a statute's constitutionality.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.